BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION

IN THE MATTER OF:)
[redacted])
[redacted])
Petitioner)
) NO. 01-04
VS.)
HAWKINS COUNTY BOARD OF EDUCATION,)
Respondent)

O R D E R

This case arose out of a request by the parent [redacted], for a due process hearing. The request was received by the school system on January 23, 2001, and by agreement of the parties, the due process hearing was held on February 12, 2001, at the offices of Special Education for Hawkins County in Rogersville.

The student, [redacted], meets categorical eligibility requirements for Special Education services pursuant to a diagnosed learning disability. Both parent and school district agree to the eligibility and this was not an issue at the due process hearing even though the parent's expert opined that the school had failed to adequately test for this diagnosis.

The primary issues presented by the petitioners were:

a. The failure of the IEP to address behavior;

b. Whether or not, under these facts, discipline was appropriate;

c. The adequacy of the functional behavior assessment;

d. The existence or adequacy of the behavior manifestation committee and hearing;

e. Whether the present placement (homebound) is consistent with FAPE and the Least Restrictive Environment for [redacted].

In summary, the petitioner states that the Hawkins County Board of Education failed to provide a sufficient Individualized Program with a Behavioral Intervention Plan for this student and in failing to do so, this student was, in a sense, led down the path to failure and ultimately suspension or expulsion in that the Board was not addressing the behavioral needs of the child. The student was found with a scheduled drug on November 7, 2000, and expelled under the school's zero tolerance policy. Presently, the student is receiving homebound instruction of 3 hours per week.

A collateral issue was raised as to the system's failure to re-evaluate every three years, however, under the circumstances of this case there was no further data required to determine the eligibility of this student and re-evaluation was, therefore, not required. The parent never disagreed to the placement and at the hearing it was undisputed that both parties agreed to the student's eligibility. At no point did the parent ask for or obtain an independent evaluation which was presented to the system to contradict placement.

In determining whether or not a student is receiving a free and appropriate education as required by state and federal law, it has been held that the reviewing court must determine:

a. Whether the school district followed all procedural safeguards, and

b. Whether the school developed an IEP which is reasonably calculated to enable the student to receive educational benefits. Board of Education of Hendrick Hudson Central School District v. Rowley, 458 US 176 (1982).

The student, [redacted], was being educated within the Hawkins County School System pursuant to an IEP which had been developed in a professional manner and approved by the parent. All procedural safeguards were granted by the Hawkins County School System and the

IEP of October 6, 2000, was in fact reasonably calculated to enable [redacted] to receive appropriate educational benefits. A subsequent IEP was developed dated November 13, 2000, and it too was with the consent of the parent. Subsequently, however, the parent brought forth his grievances to the change in placement made in the November 13, 2000, IEP. The due process request was not made until January 23, 2001.

It was further shown at the hearing that the parent was promptly and timely given all procedural safeguard notices required of the respondent. There was no issue raised of lack of notice, although again it was implied that the notice was not understood. The Administrative Law Judge, upon review of the testimony, finds these implications without merit.

The petitioner did raise issues as to a lack of or inadequate evaluation process in establishing a program for the student, however, no specific testimony was presented by these parties to contradict the process or results. It appeared that the standardized test were specific as to purpose and accurately reflected the student's aptitude. Neither parent nor system could deny that the child had been accurately diagnosed and categorized as specific learning disabled.

[redacted] moved up to Cherokee High School during the 2000-2001 school year from his middle school setting. Once the student moved

to the high school, the IEP was reviewed and a new IEP was developed. On October 6, 2000, the student continued (from evidence of Junior High reports) to have behavioral concerns and behavioral objectives were created as part of the October 6, 2000, IEP. [redacted] was placed in the regular classroom with IEP adjustments for learning, via resource teachers, and this would have been the least restrictive environment for beginning high school. The IEP addressed behavior and had a behavior plan. However, his continued behavior pattern required both in school and out of school suspension on numerous occasions. (See Exhibit 5 to the Record)

Due to the inappropriate behavior and failure of the behavior intervention objective, it was decided that a manifestation hearing was necessary. At the time the school was preparing for a behavior manifestation hearing on related behaviors, the student was caught with possession of a controlled substance and put on homebound. The system held a behavior manifestation hearing and determined that the conduct (possession of a controlled substance) was not a manifestation of his disability and, therefore, he was appropriately expelled on the basis of zero tolerance. Services continued via a homebound teacher under the IEP for a duration of 3 hours per week.

Upon a review of these facts and testimony of witnesses, it is determined that the decision regarding whether the behavior was a

manifestation of the disability was accurate. This decision was made with the benefit of a functional behavioral assessment and input from teachers and parents. The decision was made with a view toward the student's specific disability.

The behavior which prompted a change in placement was the student's admission that he was in possession of a controlled substance. Under these facts, the discipline was appropriate.

Deputy Renae Rogers of the Hawkins County Sheriff's Department testified that she is the School Resource Officer for Cherokee High School and has ten (10) years of training. She indicated that she is familiar with the smell of certain illegal drugs and was called to investigate the bathroom to determine if illegal drug use was taking place. Upon entering the bathroom, this SRO saw [redacted] and another student in the bathroom and upon being searched, it was discovered that [redacted] was in possession of a material that the SRO deemed to be a controlled substance. The student was cited into court and certified court documents indicated that he plead guilty to possession of a controlled substance, however, the material was never sent to the lab for positive identification. The offense took place on November 7, 2000. (See Exhibit 2)

After the alleged possession incident, the Assistant Principal, James Allen, invoked the sanctions of school's zero tolerance policy (Record Exhibit 1), T.C.A. 49-6-3401(g) (Record Exhibit 2), T.C.A. 49-6-4216(b)(i) (Record Exhibit 3) and the Student Handbook

(Record Exhibit 4), as they pertain to possession of controlled substances on school grounds. Although the student had been in numerous altercations at school prior to this incident (Record Exhibit 5) there had been no behavior manifestation hearing although one had been set for November 13, 2000. The school's response to the behavior pattern of multiple disturbances was to cause the student to write off and some of the personnel who provided these sanctions did not even know that [redacted] was identified with a writing disability. However, alternate forms of punishment included in-school suspension, out-of-school suspension and working with the custodian as a form of community service. All efforts of the system to modify inappropriate behavior were futile.

The school guidance counselor, Scott Jones, indicated that he was on the M-Team for the November 13, 2000, placement determination and testified that a behavior manifestation determination was held at that time as well. It was determined at this committee meeting that the learning disability did not cause his behavior, eg. possession of a controlled substance.

In response to the allegation of possession of a controlled substance and in light of the behavior manifestation determination, the parent of [redacted] was given the choice of homebound or alternative school. With the parent's consent and based upon the results of the input from members of the IEP team, it was determined that homebound would be the least restrictive environment for [redacted].

Karen Pearson, a Special Education certified instructor, with 18 years of experience and employed by the Hawkins County System testified that [redacted] father, [redacted], was given notice of a M-Team meeting on September 19, 2000, with the meeting to meet on September 25, 2000. On September 25, 2000, the parent did not attend so that meeting was re-set for October 6, 2000. On October 6, 2000, both parent and the student attended. At that time, a new IEP was established for resource Math and English. Prior to this date, [redacted] was in resource Math and English as a hold-over from his Middle School IEP. Actually, the October 6, 2000, IEP was substantially the same as the Middle School IEP, however, it specifically addressed talking and disruptive behavior. A manifestation determination was additionally made that indicated that the targeting behaviors for which [redacted] had been repeatedly sent to the office were not a result of his disability.

Also, the M-Team determined that a functional behavior assessment was needed and permission from the father was obtained for this assessment. It was determined that even though the student was causing continued behavior problems he would "stay put" or remain in his program until the functional behavior assessment was completed. During the time the Functional Behavior Assessment was being performed, [redacted] had seven (7) trips to the office, all resulting in no change in placement awaiting the results of the FBA. The FBA was completed on November 2, 2000. Before the FBA could be implemented, however, the student was homebound due to a zero tolerance violation.

The FBA was used to assist in determining that the present behavior was not a manifestation of his program disability. Absolutely no services were provided from November 8, 2000, until January 19, 2001, when homebound instruction began.

The M-Team in October, 2000, continued to rely upon a psychological report dated 1998 and it was determined from the input of all M-Team members that the categorical placement of [redacted] did not warrant renewed testing based upon his performance.

Another resource teacher, Thomas Floyd, testified that he tried numerous behavior modification techniques with [redacted] including assigned seating, isolation seating, written assignments and counseling. All efforts were futile and Mr. Floyd continued to see apathy and little or no response.

Ms. Elva Davis, the Special Education Director for the Hawkins County School System, testified that what the system was doing for [redacted] was not working. Further, she indicated that even though the system had at least 50 personnel with special education endorsements in November 2000, there was no one available to instruct [redacted] on homebound until a new person was hired in late January, 2001. Ms. Davis recognized that the last IEP contemplated 35 hours of instruction (20 special education and 15 regular) and the homebound IEP contemplated 3 hours per week. When further questioned, Ms. Davis noted that, "[redacted] is receiving the minimum," and "we have not provided services for [redacted] for

whatever reason." These comments were made concerning the lack of instruction from November to the end of January of the following year.

[redacted] father testified that the homebound instruction seemed to help and he saw better results with it than when the child was in school. He further indicated that throughout all of the school determinations, he understood his rights and could not recite a plausible reason why he didn't file a notice for hearing for some 75 days after the November 8, 2000, change in placement.

For the petitioner, Dr. Ruth Ann Satterfield, Ph D testified that the school system had failed in identifying the student as Learning Disabled due to the lack of adequate testing, however, she would not dispute that the child was a learning disabled child. Further, she testified that the child's behavior was in response to his disability in that he was not able to analyze the strategy being used by the school. In essence, the school recognizes the same behavior over and over and uses the same techniques over and over, all of which have failed. Dr. Satterfield emphasizes that this student has deficiencies in memorization skills and simply cannot analyze the strategies being implemented to correct behavior.

In that the school determined that there as no manifestation between the behavior (possession) and the disability (LD) regular discipline was invoked and the student was expelled from school with homebound instruction.

The Administrative Law Judge is concerned that the November 13, 2000, change of placement due to a violation of the zero tolerance policy was not made with the same specificity and concern as all prior placements. The IEP describes that this is a change of placement and indicates that the parent's concern is only that he wants plenty of work for the student. Special factors for consideration indicate that a behavior intervention plan had been developed along with functional behavior assessment, however, with the child on homebound the intervention plan seems futile and without any hope of success.

Further, the IEP for homebound contains the same goals and objectives which were contained in the October 6, 2000, IEP and it will be impossible for the student to have any chance of meeting these goals and objectives when the instruction changes from 20 hours per week to 3 hours per week for the new placement.

Finally, the student unquestionably did not receive any homebound services until the parent, though his representative, filed a notice for a due process hearing as to these issues. The student received absolutely no education from November 8, 2000, to January 27, 2001.

Upon a review of the testimony and the facts of this case, the Administrative Law Judge does not find any deviation from law regarding the initial process of evaluation, placement and development of the IEP as these area relate to the student,

[redacted]. The IEP was reasonably calculated to enable [redacted] to receive educational benefits.

However, this student exhibited a pattern of inappropriate behaviors which, although not deemed to be a manifestation of his disability, set the stage for an "easy way out" for the system in terms of finding an effective and alternative placement. The Functional Behavioral Assessment was begun and being conducted after the student had nine (9) in-school and out-of-school sanctions for inappropriate behavior. None of these sanctions constituted a change of placement warranting additional M-Team intervention, however, the M-Team had, wisely, already authorized and received parental consent for the FBA (Functional Behavior Assessment).

Prior to the FBA being completed, the student fell into a zero tolerance situation and the school, in removing the student, made sure that the procedural safeguards were considered to insure that the student understood the disciplinary action and the parent ultimately consented to a change in placement in the form of homebound instruction. Procedurally, the school system followed all requirements and the personnel were well trained and knowledgeable of Special Education programs and guidelines.

Unquestionably, removing the student to homebound was a change in placement which required determination of and concerning the

student's right to a free and appropriate public education within the least restrictive environment.

Under these facts, a change in placement was warranted. The student admitted to the possession of a controlled substance and he understands the nature of the allegations and their consequences.

The school accepted [redacted] as a first year high school student and initially continued his middle school IEP. Almost immediately, however, the student became disruptive. The school developed a behavioral intervention plan, but, in reality, it was never implemented with any success.

The Administrative Law Judge agrees with the determination of the behavior manifestation hearing and Functional Behavioral Assessment that the behavior, i.e. possession of a controlled substance, was not a manifestation of [redacted] disability. Testimony reflected that some of [redacted] inappropriate behavior might have arisen out of a divorce between his parents.

It is imperative under the Individuals with Disability Education Act that children with disabilities obtain an education resulting in improved results.

Further, to the maximum extent possible, students with a disability should be educated in a regular educational setting.

[redacted] was expelled from Cherokee High School on November 8, 2000, placed on homebound and received his first instruction in late January, 2001.

Unquestionably, [redacted] was denied a free and appropriate education during this first ten (10) weeks or so of his new alternative placement-homebound. Further, the school's response that they couldn't find a teacher is totally unacceptable and not lawfully justifiable.

Finally, the IEP developed on November 13, 2000, did not take into account the impossibility of [redacted] being able to assimilate in three (3) hours per week what the school system had previously been trying to implement in twenty (20) hours of Special Education programs prior to the expulsion.

THEREFORE, the Administrative Law Judge finds that:

1. The change in placement of [redacted] on November 13, 2000, was procedurally sound and warranted under the circumstances;

2. The IEP developed upon the changed placement was not designed to insure that [redacted] would receive an appropriate educational benefit;

3. A Behavior Intervention Plan was not fully developed and behavioral goals were impossible to carry out in a homebound setting;

4. Homebound is not the least restrictive environment, but instead is the most restrictive environment for [redacted];

5. The Hawkins County School System failed to provide any educational services whatsoever for [redacted] from the date of his expulsion until the time the parent requested a due process hearing.

Upon these findings, it is ORDERED that:

a. The student shall be removed from homebound to an alternative school setting where he can receive a minimum of twenty (20) hours of special education services per week;

b. The Hawkins County School System shall provide extended year service to [redacted] to make a reasonable effort to catch up on lost progress when services were not provided or provided in a modest or minimal manner on homebound;

c. A Behavior Intervention Plan with specific objectives shall be implemented within the alternative school setting;

d. Petitioner's counsel shall receive his reasonable attorney's fees of $3,300.00, based upon his affidavit attached hereto, and the respondent shall pay the costs;

e. Petitioner's request for payment of the fee for Dr. Ruth Ann Satterfield is denied in that this expert provided assistance or consultation services to petitioner's counsel, but did not analyze, interpret or present new theories altering the disability process which could be utilized by the School System or the Administrative Law Judge in making a determination.

Enter this the 8th day of March, 2001.

MICHAEL E. SPITZER
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon Mr. William A. Zierer, Attorney and Counselor, P.O. Box 1276, Morristown, TN 37816-1276, and Mr. James O. Phillips, III, PHILLIPS & HALE ATTORNEYS, The Citizens Bank of East Tennessee Building, 210 East Main Street, Rogersville, TN 37857, by enclosing the same in envelopes addressed to them, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mail box in Hohenwald, Tennessee, on this the 8th day of March, 2001.

ADMINISTRATIVE LAW JUDGE